HFCO, INC.

IBLA 94-490 Decided January 12, 1998

Appeal from a Decision of the District Manager, Tulsa District Office, New Mexico, Bureau of Land Management, disapproving coal exploration plans. NM-50410-OK.

Affirmed.

1. Coal Leases and Permits: Generally

> Coal exploration plans that involve the drilling of 15 holes and the extraction of 1,000 tons of coal are properly disapproved by BLM pursuant to 43 C.F.R. § 3482.2(a)(1) when its experts find that the plans far exceed the requirements of exploration as defined by 43 C.F.R. § 3480.0-5(a)(14).

APPEARANCES: Thomas H. Stringer, Jr., Esq., Henryetta, Oklahoma, for HFCO, Inc.; Arthur Arguedas, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Santa Fe, New Mexico, for the Bureau of Land Management.

OPINION BY ADMINISTRATIVE JUDGE KELLY

HFCO, Inc. (HFCO), has appealed from an April 18, 1994, Decision of the District Manager, Tulsa District Office, New Mexico, Bureau of Land Management (BLM), disapproving its four coal exploration plans (Nos. 1-1 through 1-4) for Federal coal lease NM-50410-OK, situated in the E½ sec. 3, T. 9 N., R. 24 E., Indian Meridian, LeFlore County, Oklahoma.

HFCO filed its four exploration plans for BLM's approval, as required by 43 C.F.R. § 3482.1(a), on June 29, 1993. The filing was made shortly before its lease was to expire on September 1, 1993, 10 years after the effective date of the lease, in the absence of the production of coal in commercial quantities, as required by the diligent development requirements of 30 U.S.C. § 207(b) (1994) and 43 C.F.R. Part 3480. HFCO's plans are summarized as follows:

> Plan No. 1-1 proposed drilling fifteen (15) exploration holes and the excavation of one test pit to extract up to 250 tons of coal. Plans 1-2, 1-3, and 1-4 proposed excavating another three (3) pits, one per plan, and excavating up to 250 tons of coal from each pit. In summation, the plans proposed removing up to

> 1000 tons of coal from four (4) pits and the drilling of fifteen (15) exploration holes to test the blendability of this coal with Secor coal mined at other locations and to gather more geological information on the lease for use in future mine development.

(Decision at 1.)

HFCO planned to combine coal extracted from the leasehold and private coal from nearby lands and sell it for use in a coal-burning electrical generation facility recently constructed in the vicinity. HFCO and BLM agree that the 1,000 tons produced would exceed the 900 tons required for production in commercial quantities and satisfy the diligent development requirement.

The District Manager had initially disapproved HFCO's exploration plans by Decision dated July 28, 1993, based solely on BLM's belief that the planned activity was not for the purpose of exploration, within the meaning of the regulations, but simply to extend the lease by producing coal in commercial quantities. HFCO appealed timely to the Board, and by Order dated August 25, 1993 (IBLA 93-590), we set aside the July 1993 Decision because it did not have an appropriate basis and remanded the case to BLM for further consideration.

While the case was once again pending before the District Manager, the Acting State Director, New Mexico, BLM, issued a September 1, 1993, Decision suspending the lease effective June 29, 1993, the date HFCO submitted the exploration plans. The Decision instructed the Tulsa District Office to issue another Decision on the plans and directed that the suspension was to be extended until the District Office issued a Decision disapproving HFCO's plans, or if appealed, until the Board affirmed the Decision. If, on appeal, the Board reversed the Decision, the suspension was to extend until 65 days (the time originally left for HFCO to achieve diligent development) after the date of reversal to allow HFCO the chance to extend its lease by producing coal in commercial quantities. HFCO did not appeal the Acting State Director's September 1, 1993, Decision.

The District Manager disapproved HFCO's plans in his April 18, 1994, Decision on the basis that the plans did not meet the definition of exploration at 43 C.F.R. § 3480.0-5(a)(14), because sufficient exploration data had already been collected. The District Manager explained:

> HFCO operated a coal mine on private coal adjacent to the Federal lease in the early 1980's and has ample information on the coal and surrounding strata as reflected in the geologic report dated October 29, 1981 and confirmed by the field check memorandum dated November 10, 1981. Given the small size of the lease, such data can be reasonably extrapolated through the lease area.
>
> In addition, the Stigler (McAlester) coal, which underlies the property, is currently being mined at the Red Oak Mine in Latimer county. This coal is sold in the same markets served by

> HFCO. These markets also purchase Secor coal from P & K's mines; therefore, customers have opportunity to blend the coals. We believe that any additional tests or analyses required could be performed on less than 250 tons total.

(Decision at 1.) The District Manager provided however, in accordance with 43 C.F.R. § 3482.2(a)(1), that HFCO could modify its plans, "by submitting one plan proposing the drilling, coring, and/or removal of an amount of coal necessary to meet stated exploration goals for the 100 acres under lease." Id. at 2. There is no indication in the record that HFCO ever submitted modified plans.

HFCO appealed from the District Manager's April 18, 1994, Decision and filed a Petition for Stay, which was denied by the Board's Order of July 7, 1994. In its Statement of Reasons (SOR), HFCO contends that the subject leasehold has not been explored and that its plans encompass "exploration" within the meaning of 43 C.F.R. § 3480.0-5(a)(14). It argues that, in deciding whether HFCO intends to engage in exploration, BLM acted outside the scope of the applicable regulation:

> The Tulsa District Office is attempting to expand on the definition of exploration provided in 43 CFR 3480.0-5(a)(14) in maintaining that because this seam of coal is mined in another county and an adjacent tract of this coal was mined in the early 1980's that little further exploration is needed. Such definition is not part of the Code of Federal Regulations, and the best judge of the need for additional exploration is surely the operator who is risking the funds needed to develop the resource.

(SOR at 2.) As evidence that its lease has not been fully explored, HFCO notes that BLM's April 1994 Decision "invites additional exploration if only [HFCO] will reduce the scale of its exploration." (Petition for Stay at 1.) HFCO asks that the Board reverse the Decision and instruct BLM to approve its plans.

[1] In order to engage in the exploration for Federal coal on leased lands prior to the commencement of mining operations, the operator/lessee is required to "submit an exploration plan to and obtain approval from the authorized [BLM] officer." 43 C.F.R. § 3482.1(a). That plan consists of a detailed plan to conduct exploration, showing the location and type of exploration. 43 C.F.R. § 3480.0-5(a)(15). "Exploration" is defined by 43 C.F.R. § 3480.0-5(a)(14) as

> drilling, excavating, and geological, geophysical or geochemical surveying operations designed to obtain detailed data on the physical and chemical characteristics of Federal coal and its environment including the strata below the Federal coal, overburden, and strata above the Federal coal, and the hydrologic conditions associated with the Federal coal.

In this case, the District Manager conceded that additional testing may be warranted, but concluded that "any additional tests or analyses required could be performed on less than 250 tons of coal." (Decision at 1.) On appeal, the District Manager explained that "HFCO's proposal * * * far exceeds the requirements for testing according to the expert opinion of our mining engineer and coal geologists." (Response to Petition for Stay at 3.) HFCO has failed to refute such expert opinion. Thus, we reject HFCO's mere assertion that the operator is the best judge of what additional exploration is necessary.

The BLM's options in approving or disapproving exploration plans are limited. Regulation 43 C.F.R. § 3482.2(a)(1) provides:

> The authorized [BLM] officer after evaluating a proposed exploration plan * * * shall promptly approve or disapprove in writing an exploration plan. In approving an exploration plan, the authorized officer shall determine that the exploration plan complies with the rules of [43 C.F.R.] [P]art [3480] * * * and any Federal lease * * * terms and/or conditions. * * * In disapproving an exploration plan, the authorized officer shall state what modifications, if any, are necessary to achieve such conformity.

(Emphasis added.)

Thus, the District Manager did not have the authority to unilaterally modify or alter the plans so as to bring them into conformance with the regulations by selectively eliminating inappropriate exploration activity. Rather, his only alternative under 43 C.F.R. § 3482.2(a)(1) was to disapprove the plans, specifying ways in which they might be modified by HFCO to achieve conformance.

Therefore, we conclude that, in his April 18, 1994, Decision, the District Manager properly disapproved HFCO's four coal exploration plans (Nos. 1-1 through 1-4) in their entirety.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision appealed from is affirmed.

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John H. Kelly
Administrative Judge

I concur:

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Franklin D. Arness
Administrative Judge